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No. 574

IN THE

Supreme Court of the United States

DAVID MASLOWSKY, GEORGE CHRISTOPHER, SAM J. KAPLAN, F. W. SCHELLENBERGER, IRVING L. GOTTLIEB and BARBARA SLOVE,

Appellants,

vs.

JOHN E. CASSIDY, JR., Chairman, PAUL F. ELWARD, ALBERT W. HACHMEISTER, CECIL A. PARTEE, THOMAS F. RAILSBACK and GEORGE M. BURDITT, Members of the Illinois House of Representatives Commission, created under House Bill 2269, 74th Illinois General Assembly,

Appellees.

On Appeal From The Supreme Court Of
The State of Illinois.

Petition for Rehearing

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On Appeal From The Supreme Court Of The State of Illinois.

Petition for Rehearing

Appellants respectfully petition this Honorable Court for a rehearing of the order entered by this Court on October 10, 1966 dismissing this appeal for want of a properly presented federal question.

The grounds of this petition are:

(1)

According to a leading textbook on practice before this Court, dismissal of an appeal for "want of a properly presented federal question" means "that the federal question, substantial though it may be, was not raised at the proper point in the state court proceedings or in accordance with reasonable state court rules." (Stern and Gressman, Supreme Court Practice (3rd ed. 1962), p. 198.)

(2)

All of the federal questions presented in appellants' Jurisdictional Statement were presented to the Illinois courts at the earliest possible juncture in the litigation.

(a) Appellants alleged in their petition filed in the Illinois Circuit Court on July 13, 1965 that the electronic eavesdropping and wiretapping violated their rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and under Section 605 of the Federal Communications Act. (A. 7-8.) In their petition filed in the Circuit Court on August 25, 1965, appellants expressly alleged that "The use by the Commission of the aforesaid tape recordings or excerpts therefrom, or witnesses or information derived therefrom, . . . will violate petitioners' rights under Section 14-5 of the Illinois Eavesdropping Act, under the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution, . . ." (E. 54.) In their prayer for relief, appellants requested that the court declare House Bill 2269 and the Commission created by that bill to be unconstitutional. (E. 56.)

(b) On July 14, 1964, in the grand jury case, the Circuit Court held that "the constitutional rights of [appellants] have been violated" by the eavesdropping and wiretapping. (A. 31.) However, the order entered by the Circuit Court on August 30, 1965 enjoining the House Commission was based upon the Illinois Eavesdropping Act, so that the court did not reach the federal issues. (E. 72-73.)

(c) The Commission did not tender the "implied repeal" argument (*i.e.*, that House Bill 2269 operated as a partial implied repeal of the Illinois Eavesdropping Act) until it filed its brief in support of its appeal to the Supreme Court of Illinois. Appellants, in their answering brief and in their Petition for Rehearing, urged that if House Bill 2269 were construed to effect a retroactive partial repeal of the Illinois Eavesdropping Act, appellants' rights under the Equal Protection Clause of the Fourteenth Amendment would be violated. (Brief in No. 39710, pp. 57-81; Petition for Rehearing in No. 39710, pp. 2-8.) Appellants contended also that the recordings had been obtained in violation of their rights under the federal Constitution and under Section 605 of the Federal Communications Act, and that use by the Commission of the recordings would constitute a further breach of those rights. (Brief in No. 39526, pp. 24-26, 34-36; Brief in No. 39710, pp. 36, 38-41; Petition for Rehearing in No. 39710, pp. 8-12.)

(3)

(a) *The Supreme Court of Illinois expressly ruled upon the questions raised by appellants under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution* (34 Ill.2d 456 at 469-470):

> "But petitioners [appellants] assert that when thus construed H.B. 2269 is unconstitutional legislation and denies their constitutional rights to equal protection of the law and due process. . . . First, it is alleged that there would be an exemption of this commission to the exclusion of any other legislative committee or the General Assembly itself and, second, that it would create an arbitrary and unconstitutional classification among victims of eavesdropping.
>
> "The purpose of H.B. 2269 is a public one. It provides for a legislative inquiry insofar as the materials will reflect upon or involve civil officers of the State, whether they be members of the General Assembly or not. Thus, the purpose is not just for the benefit of members of the commission, but for the whole General Assembly through its agency, the commission. The petitioners have not been indicted, nor in fact, even accused of a crime. Under our views hereinbefore expressed, the tapes and excerpts cannot be used as evidence before a grand jury or in a criminal proceeding against them because of the unaffected provisions of the eavesdropping statute remaining in full force after the adoption of H.B. 2269. The petitioners have been and may well be further embarrassed by disclosures on the tapes (as may others named therein) but this legislative investigation gives them no constitutional grounds for objection."

(b) In ruling that the Commission could make use of the recordings, the Supreme Court of Illinois also, by necessary implication, passed upon and rejected appellants' alternative contentions that the recordings were obtained in violation of their rights under the United States Con-

stitution and Section 605 of the Federal Communications Act, and that the Commission's use of the recordings would constitute a further breach of those rights. The Supreme Court of Illinois held that the Commission's public use of the recordings in its investigation would violate no rights (constitutional, statutory or otherwise) of appellants.

(4)

Since the Supreme Court of Illinois ruled (expressly or by necessary implication) upon all of the federal questions raised by appellants, there is no doubt that those questions were properly raised and preserved in the Illinois courts. In *Raley* v. *Ohio,* 360 U.S. 423 (1959), this Court said (360 U.S. at 436):

> ". . . There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. See *Manhattan Life Ins. Co. of New York* v. *Cohen,* 234 U.S. 123, 134."

Directly applicable to this case is the rule enunicated by this Court in *Charleston Federal Savings & Loan Association* v. *Alderson,* 324 U.S. 182, 185-186 (1945):

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

(5)

All of the foregoing contentions are set forth in appellants' notice of appeal to this Court filed on August 10, 1966 with the Clerk of the Illinois Supreme Court, in appellants' motion to stay the mandate of the Illinois Su-

preme Court which was presented to and granted by Mr. Justice Tom C. Clark, and in appellants' Jurisdictional Statement.

(6)

Appellees (the House Commission) do *not* contend that appellants failed properly to raise the federal questions in the state courts. Indeed, at the *in camera* hearing before Honorable Tom C. Clark on September 12, 1966, in response to a direct inquiry on this subject by Mr. Justice Clark, counsel for the House Commission (Owen Rall, Esq.) conceded that the federal questions set forth in appellants' notice of appeal had been properly raised, preserved and ruled upon, expressly or by implication, in the state courts.

(7)

(a) The questions raised by appellants under the Equal Protection Clause of the Fourteenth Amendment are properly presented and are ripe for determination. The discriminatory and arbitrary exception carved out of the Illinois Eavesdropping Act by House Bill 2269—applicable to these appellants and to them only—is a clear violation of appellants' rights under the Equal Protection Clause. That Clause prohibits unjust classifications in any area of the law, not only (as the Commission has contended) those which threaten criminal jeopardy or punishment. But once the Commission is permitted to make use of the illegally obtained recordings, the violation of appellants' rights will have occurred, and the harm will be irreparably done. Accordingly, this Court should act now to prevent the impending incursion of appellants' rights under the Equal Protection Clause.

(b) This case also presents substantial justiciable issues as to whether the Commission's public use of the recordings will violate appellants' rights under the Due Process Clause

of the Fourteenth Amendment. That Clause, as interpreted by this Court, prohibits surreptitious eavesdropping and wiretapping of the kind involved in this case, and bars the states and their agencies from making use of evidence thereby obtained. Whether the Due Process Clause stands as a barrier to use of such evidence by a state legislative investigative commission is one of the substantial federal questions involved in and tendered by this appeal.

(c) The previous unlawful publication of a portion of the recordings in a Chicago newspaper does not vitiate appellants' rights to suppress the recordings in order to prevent further incursions of their constitutional rights. One violation cannot serve to justify another. The right to the privacy and sanctity of one's personal conversations is a mere form of words if citizens, whose privacy has been invaded by unlawful bugging devices, cannot apply to the courts in advance for orders enjoining public airing of the illicit recordings, especially when it is an arm of the state government which threatens the unlawful publication.

(d) All of these contentions—those involving the Equal Protection Clause and those involving the Due Process Clause—raise serious issues of substantial import to our society, and, we respectfully submit, should be passed upon by this Court. They have been pressed by appellants at every appropriate stage of this case.

(e) Appellants earnestly submit that the questions raised by this appeal are not only substantial, but have been properly and appropriately presented and preserved throughout.

Wherefore, appellants respectfully and earnestly pray that this Court reconsider its order dismissing this appeal entered October 10, 1966, and thereafter grant plenary consideration of this case.

Respectfully submitted,

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October 11, 1966.

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

Thomas P. Sullivan, one of the attorneys for appellants, on oath states that the matters stated in this Petition are true, and that this Petition is filed in good faith and not for the purpose of delay.

.....
Thomas P. Sullivan

Subscribed and sworn
to before me this 11th day of
October, 1966.

.....
Notary Public